No. 18,275

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND L. STOVER, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the Judgment of the United States District Court for the Northern District of California, Northern Division
Honorable Sherrill Halbert, Judge

APPELLANTS' PETITION FOR A REHEARING

P. M. BARCELOUX,
BURTON J. GOLDSTEIN,
GOLDSTEIN, BARCELOUX & GOLDSTEIN,
REGINALD M. WATT,
P. O. Box 1540, Chico, California,
PERKINS, CARR & ANDERSON,
926 J Building, Suite 1311,
Sacramento, California,
Attorneys for Appellants and Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 18,275

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND L. STOVER, et al.,	*Appellants,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

Appeal from the Judgment of the United States District Court for the Northern District of California, Northern Division
Honorable Sherrill Halbert, Judge

APPELLANTS' PETITION FOR A REHEARING

To the Honorable Chief Judge and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

I

INTRODUCTION

Appellants respectfully petition for rehearing in the above-entitled consolidated cases.

This petition for rehearing is sought on the grounds of several erroneous statements and inferences in the printed Opinion of this Court. We will set forth each erroneous statement or erroneous inference separately together with a quotation, with specific transcript references, as to each correct statement or inference.

II

GROUND NUMBER ONE

The Opinion states on pages two and three:

"The trial court had a trial on the applicability of section 702c.

In a pre-trial order the court ruled that 33 U.S.C. section 702c 'applied to all floods and flood waters which result in whole or in part from unusual or extraordinary precipitation' and defined 'unusual or extraordinary' as meaning 'conditions which, in the light of experience, would not be anticipated by a normal person using ordinary care.' Then it went on to say section 702 'does not apply to "man-made floods" which result solely from negligent acts.' Then the term 'man-made flood' was defined as a 'flood which is created solely by the construction or fabrication of a barrier which, but for the barrier, would not have been impounded.'

In its findings of fact the court said: the waters were unusual and extraordinary. For amplification of the court's findings see the court's opinion. Stover v. United States, 204 F. Supp. 477. Evidence of negligent construction was excluded as not being within the issues of the trial on the applicability of 702c.

If the court adhered to its original definition, we believe it found that the rains and runoff were not foreseeable. If that be the case, would one even reach the applicability of section 702c? Under general negligence is there ever liability for the thing that cannot reasonably be foreseen by the ordinary prudent person who plans waterways?"

These paragraphs are in error in the following particulars:

1. While the *Pre-Trial Order* did define "unusual or extraordinary" precipitation as meaning "conditions which, in the light of experience, would not be anticipated by a normal person using ordinary care", the Trial Court specifically rejected Appellants' offers of proof that:

> "The amount of precipitation which contributed to the water which injured the plaintiffs was reasonably foreseeable by:
>
> (1) The United States Government, Corps of Engineers, and Weather Bureau, and
>
> (2) A reasonably prudent person under the same or similar circumstances"
>
> (R.T. 684:20-685:1; Appellants' Opening Brief, p. 24)

> "The amount of flow which contributed to each break was reasonably foreseeable by:
>
> (1) The United States Corps of Engineers and Weather Bureau, and
>
> (2) A reasonably prudent person under the same or similar circumstances."
>
> (R.T. 685:20-686:1; Appellants' Opening Brief, p. 24)

Therefore the sentence in the Opinion at the top of page 3:

> "If the court adhered to its original definition, we believe it found that the rains and runoff were not foreseeable."

contains an erroneous inference as the Trial Court specifically refused to hear evidence proving *beyond*

any doubt that the amount of precipitation and the amount of flow were both foreseeable.

2. While the Opinion states on page 2:

> "In its findings of fact the court said: the waters were unusual and extraordinary."

the fact is that the Trial Court *did not adhere* to its original definition of unusual and extraordinary, as it had rejected Appellants' offers of proof as above quoted, but rather, the Trial Court changed its definition in its "Conclusions of Law" saying:

> ". . . unusual or extraordinary climatic conditions, that is, from climatic conditions which are so severe that a reasonably prudent person using ordinary care would expect a flood to occur as a result of such conditions." (Cl. Tr. 36:23-27.)

Thus we see that the Trial Court not only *did not rule* that the rains and runoff were not foreseeable, but rather ruled that foreseeability was not an issue, and further ruled that "unusual or extraordinary" meant, climatic conditions which would be expected to produce a flood.

In plain language, the Trial Court did not define "flood or flood waters" in the manner stated or inferred in the Opinion of this Court.

The Trial Court defined a "man-made" flood, ruled that Section 702c does not apply to a man-made flood, and then rejected Appellants' offers of proof to prove that this was a man-made flood.

(Appellant's Opening Brief, pages 16-25.)

III

GROUND NUMBER TWO

The Opinion states on page 3:

> "and there really would not be any reason to legislate on damage caused purely by nature."

To the contrary there was reason, and frequently is reason to enact legislation which is nothing more than a codification of a common-law rule. The reason here was that Congress, in embarking on a broad program of flood control, did not want this legislation to be construed as an acceptance by the Government of liability for flood damage not caused by conduct of the Government.

Many statutes are merely examples of legislative recognition of generally accepted common law principles. In fact, if we accept the government's argument that governmental immunity is a common law principle and that this is an immunity statute, then Section 702c is merely a legislative recognition of that principle, and, in the language of this Court "there really would not be any reason to legislate."

That many statutes are merely declaratory of the common law is well stated in 50 Am. Jur. 339-342, Statutes, Sec. 346, in these words:

> "There are many cases in which particular statutes under consideration are regarded as declaratory of the common law."

The question here is not whether Section 702c was a mere legislative recognition of a then generally accepted principle of law, but *which "generally accepted*

principle'' was intended to be recognized by this statute.

The ground upon which we urge this point for rehearing is that there is not one word in the legislative history to support a conclusion that Section 702c was meant to be an immunity statute, but rather the legislative history rejects such a conclusion.

IV

GROUND NUMBER THREE

On page three of the Opinion the Opinion states:

> ''Appellants finally contend that if 33 USC 702c bars a suit for damage caused by negligent federal planning of a flood control project then the section is unconstitutional as causing a taking without just compensation proscribed by the Fifth Amendment.''

We respectfully refer the Court to Appellants' Opening Brief, pages 69-74 wherein we discussed the Constitutional question and point out that we did not mention or refer to the eminent domain question, nor did we refer to the eminent domain question in our oral argument.

Appellants' contention with respect to the constitutional question was that Section 702c, if construed as an immunity statute, would be unconstitutional as a *denial of due process of law* as it would destroy a right without providing a reasonable substitute.

Simply stated, the Opinion speaks of a constitutional question not raised by Appellants, and the Opinion fails to mention the constitutional question which was raised by Appellants.

V

CONCLUSION

Appellants' respectfully seek rehearing in these cases on the grounds that it contains major erroneous statements of fact and law.

The errors are:

1. The inference that the rains and run-off were not foreseeable, when the Trial Court had refused to permit Appellants to prove that they were foreseeable.

2. The statement that the Court's reference to "unusual and extraordinary" meant unforeseeable when the Trial Court specifically ruled that it meant climatic conditions which would be expected to produce a flood.

3. The inference that the statute should be construed as an immunity statute because Appellants' construction would merely be a codification of a recognized legal principle, when construing the statute as an immunity statute would itself merely be a codification of a then recognized legal principle.

4. The statement that Appellants urged that Section 702c be held unconstitutional because of the eminent domain provision of the Fifth Amendment